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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. [redacted] 192

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and WAYNE LAHEY,
Appellants,

vs.

THE GRANT COUNTY PLANNING BOARD AND ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1374

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and WAYNE LAHEY,
Appellants,

vs.

THE GRANT COUNTY PLANNING BOARD AND ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

MOTION TO DISMISS

Appellees move to dismiss on the grounds that the federal question sought to be reviewed was not timely raised or expressly passed on below and that the question presented is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Where a state legislature, consistently with state constitutional provisions, delegates to a state official the final responsibility for fixing school district boundaries, does a provision that an election within a particular area as to which district it should be attached shall be advisory only deny electors in that area due process of law?

STATEMENT

The 1963 session of the Kansas legislature, by enacting the statute here involved,[1] attempted a sweeping revision of entire school system of the state. Its object was to reduce the number of districts and provide a uniform corporate form, with each district offering both elementary and high school grades.

Previous efforts to accomplish this aim in 1945 and 1961 had met with failure because the acts involved left the final determination of school district boundaries to local planning boards. The Kansas court viewed this as an unconstitutional delegation of legislative power. *State ex rel.* v. *Hines,* 163 Kan. 300, 182 P.2d 865 (1947); *School District, Joint No. 71* v. *Throckmorton,* 189 Kan. 590, 370 P.2d 89 (1962).

Taking the lessons of those cases to heart, the legislature in its 1963 act left the final decision in all instances to the State Superintendent of Public Instruction. In so doing, the legislature relied on *State ex rel.* v. *Storey,* 144 Kan. 311, 58 P.2d 1051 (1936), where the Kansas court had held that under the Kansas Constitution, Art. 6, §1, the

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1. Kan. Sess. Laws 1963, Ch. 393, now Kan. Stat. Ann. 72-6734 through 72-6763 as amended by Kan. Sess. Laws 1965, Ch. 410 and Ch. 420. The pertinent portions are reproduced as Appendix C to the Jurisdictional Statement.

state superintendent occupies a unique position among executive officers in that legislative authority in school matters may be delegated to him even without standards. This reliance proved well founded when the 1963 act was upheld in *Tecumseh School District* v. *Throckmorton*, 195 Kan. 144, 403 P.2d 102 (1965).

In harmony with this general scheme, recommendations of local (county) planning boards as to district boundaries were required to receive unconditional approval of the state superintendent before being submitted to an election.[2] Petitions for the creation of districts in areas where planning board proposals failed at the polls were required to receive similar approval.[3]

The transfer of a so-called "gray-area" from one planning unit to another under K.S.A. 72-6743 was to be accomplished after an election to determine "whether it is the desire" of the electors that it be transferred, followed by a determination of the "advisability" of the transfer by the two planning boards, and finally subject to the "approval thereof" by the state superintendent.

Here, as the court below noted (195 Kan. at 642), the vote in the 15 square mile gray-area in question was 52 in favor of the transfer to 44 opposed. One board found the transfer desirable, one did not. For reasons set forth in the opinion below, the state superintendent refused to transfer the territory. The trial court held such action to be within his authority, and the Kansas Supreme Court affirmed.

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2. K.S.A. 72-6746.
3. *Ibid.*

The Federal Question Was Not Timely Raised or Expressly Passed on Below

Although appellants in their petition referred on three occasions to "due process," none of the references were aimed at the statute as construed. Paragraph 14 (R. p. 11) of the petition alleged that the entry of the order of the state superintendent was without notice and hearing. Paragraph 23 (R. p. 13) alleged that by approving the recommendations of the Grant County planning board the state superintendent had prejudged the controversy. Finally, paragraph 24 (R. pp. 13-14) alleged an effort on the part of the state superintendent to "usurp the constitutional prerogatives of the legislature," and that his actions "constitute a denial of due process of law to your petitioners contrary to the constitution of the State of Kansas."

In the hearing before the trial court (R. pp. 16-76) the United States Constitution was never mentioned. The Kansas Supreme Court made passing mention of appellants' reference to "due process" (195 Kan. at 643), but the opinion was devoted to the main questions raised by appellants' argument, i.e., whether the statute contemplated that the election be advisory only and, if so, whether it violated the separation of powers doctrine inherent in the Kansas constitution.

The Question Presented Is Not Substantial

Appellants' contention is that a state legislature cannot avail itself of an advisory election in determining municipal boundaries. This novel proposition is wholly unsupported by authority.

To support a claim of denial of due process, appellants must first demonstrate some right of which they have been deprived. Yet it cannot seriously be urged that the individual appellants had a right to an election on the

boundary change, or that they or the appellant school district had a vested right in the continued existence of its boundaries.

This case falls squarely within the doctrine of *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907) and *Laramie County* v. *Albany County*, 92 U.S. 307 (1875), that a state has power unlimited by the United States Constitution to organize, alter or destroy its political subdivisions. The issue presented in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), is not present here, nor are the other exceptions to the doctrine noted in that case. That the doctrine is applicable to school districts is illustrated by *Kies* v. *Lowrey*, 199 U.S. 233 (1905).

Since appellants had no right to an election, they cannot complain that the one held was advisory. Perhaps the closest analogy is to the advisory jury. Like elections, the jury trial is a basic element of our system of government. Yet in those cases where a jury is not a matter of right, it may be invoked in an advisory capacity and its verdict may be disregarded by the court. *Kohn* v. *McNulta*, 147 U.S. 238 (1893); *Idaho and Oregon Land Improvement Co.* v. *Bradbury*, 132 U.S. 509 (1889). Compare Fed. R. Civ. P. 39(c)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

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